



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JANUARY 09, 2023

IN THE MATTER OF:

Appeal Board No. 627017 A

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board No. 627017 A, the claimant applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and reconsideration of Appeal

Board No. 624936 A, filed August 24, 2022, which adhered to its prior decision (Appeal Board No. 622351), filed June 6, 2022, which affirmed the decision of the Administrative Law Judge and sustained the initial determination disqualifying the claimant from receiving benefits, effective October 15, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to October 15, 2021 cannot be used toward the establishment of a claim for benefits.

In Appeal Board No. 627018 A, the claimant applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and reconsideration of Appeal

Board No. 624937 A, filed August 24, 2022, which adhered to its prior decision (Appeal Board No. 622352), filed June 6, 2022, which affirmed the decision of the Administrative Law Judge and sustained the initial determination holding the claimant ineligible to receive benefits, effective beginning September 26, 2021 through October 14, 2021, on the basis that the claimant was not available for employment.

Upon consideration of the application to reopen, after due notice to the parties, the Board has decided to reopen and reconsider its decision.

In Appeal Board No. 627018 A, it is

ORDERED, that the decision of the Appeal Board (Appeal Board No. 624937 A) is adhered to.

The decision of the Administrative Law Judge is affirmed.

The initial determination, holding the claimant ineligible to receive benefits, effective beginning September 26, 2021 through October 14, 2021, on the basis that the claimant was not available for employment, is sustained.

In Appeal Board No. 627017 A, our review of the record reveals that the case should be remanded to hold a hearing. Further testimony and evidence may be needed before deciding whether the claimant's refusal of the COVID-19 vaccine should disqualify her from receiving benefits. The parties are hereby on notice that the Judge shall consider the alternate issue of voluntary leaving of employment without good cause, on the basis that the claimant refused the COVID-19 vaccine, and/or pursuant to the theory of provoked discharge, where an employee voluntarily engages in conduct which transgresses a legitimate known obligation that leaves the employer no choice but to terminate the employment relationship (See Matter of DeGrego, 39 NY2d 180 [3rd Dept. 1975]) together with the original issue of misconduct in connection with employment.

The parties may produce any further witnesses or documents that may be relevant. The Judge may take any other testimony and evidence necessary to decide the case.

Now, based on all of the foregoing, it is

ORDERED, that the decisions of the Appeal Board (Appeal Board Nos. 624936 A and 622351) and the Administrative Law Judge, are, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issue of misconduct together with the newly included alternate issue of voluntary leaving of employment without good cause, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard;

and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

JUNE F. O'NEILL, MEMBER